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No. 98-1885

In the

Supreme Court of the United States

Charles C. Carella, Trustee/Receiver Under Orders of the United States District Court for the District of New Jersey,
Petitioner,

v.

State of New Jersey, Department of the Treasury, By Samuel Crane, Treasurer,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the State of New Jersey deprive Eddie Antar of due process of law by refusing to refund to the court-appointed receiver of his assets gross income tax monies voluntarily paid by Antar, who reported to the State that he was a New Jersey resident?

2. Does the State of New Jersey deprive a nonresident of the privileges and immunities of a citizen of the State where it provides the same period of limitations for residents and nonresidents alike to claim a refund of taxes paid on income that is not subject to tax by New Jersey, and provides only residents with an unlimited period of time to claim a further credit against New Jersey tax on income earned in and taxed by another jurisdiction, where such income of nonresidents is not subject to tax by New Jersey?

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The judgment of the Supreme Court of the State of New Jersey entered on February 23, 1999, denying Petitioner's Petition for Certification is reported at 158 *N.J.* 73, 726 *A.2d* 937 (N.J. 1999).

The Opinion and Order of the Appellate Division, Superior Court of New Jersey, filed December 4, 1998, is not reported and is reprinted in its original form in the Petitioner's Appendix, p. A-3.

The Opinion of the Chancery Division of the Superior Court of New Jersey entered on May 20, 1997, is not reported and is reprinted in the Petitioner's Appendix, p. A-9.

The Opinion of the Chancery Division of the Superior Court of New Jersey entered on October 18, 1994, is not reported and is set forth in the Appendix hereto at A-1.

COUNTERSTATEMENT OF THE CASE

In 1990, petitioner Charles C. Carella was appointed in a federal action as a trustee/receiver for the purpose of marshaling the assets of Eddie Antar ("Antar"). Notwithstanding that he had the facts essential to his claim months earlier, petitioner first made known his demand for a refund of gross income taxes paid by Antar to the State of New Jersey at an October 31, 1991 meeting among his attorney and representatives of the State. At that time, and at all times since, petitioner refused to characterize the demand as a statutory refund claim made pursuant to the New Jersey Gross Income Tax Act, *N.J. Stat. Ann.* §54A:9-8(a), but insisted that the claim was solely equitable in nature.

Following the State's refusal to settle his equitable claims, petitioner filed suit in the Chancery Division of the Superior Court of New Jersey. The complaint suggested that the income on which Antar was said to have paid taxes to New Jersey was principally derived from his transactions in the stock of Crazy Eddie, Inc., a company dominated by Antar which was central to the federal action in which Petitioner was appointed trustee/receiver. The complaint's common theme was that the State had been unjustly enriched by Antar's income tax payments to it and that New Jersey therefore held the monies on an implied contract to pay them over to petitioner or upon a constructive trust in favor of petitioner.

On the State's motion to transfer the action to the New Jersey Tax Court or, alternatively, to assign the action to a Tax Court judge, which motion was vigorously opposed by petitioner, the matter was assigned to a judge of the Tax Court temporarily assigned to the Chancery Division. The basis of petitioner's opposition was that he did not seek a refund of taxes, that the money in issue was not tax money, and that none of the claims set forth in the complaint were cognizable in the Tax Court.

Petitioner subsequently filed an amended complaint which included the same equitable causes of action, and additionally claimed that Antar was a resident of New Jersey and that the tax liability reported and paid by Antar to New Jersey should be recalculated pursuant to *N.J. Stat. Ann.* § 54A:4-1, in order to apply a credit for the millions of dollars of taxes which New York claimed to be due to it.

The amended complaint further alleged that there was no nexus or minimal connection between Antar and the State and that the State's retention of Antar's tax monies therefore violated the Due Process Clause of the United States Constitution. Consistent with his position that the monies he sought were not tax monies, and that the statutory period of limitations for tax refund claims was inapplicable to his claims, petitioner did not include in his pleadings a claim that a refund was due to Antar because he did not meet the statutory definition of resident, *N.J. Stat. Ann.* § 54A:1-2(m), as defined by the Act.

On subsequent cross-motions for summary judgment, the trial court dismissed those counts of the complaint based on equitable causes of action, determining in a written opinion dated October 18, 1994, that *N.J. Stat. Ann.* § 54A:9-8(a) was the exclusive remedy for the refund of the tax money paid by Antar. The court also held that the doctrine of equitable tolling could not be applied to extend the limitation period prescribed by *N.J. Stat. Ann.* § 54A:9-8(a). The court further held that, notwithstanding petitioner's consistent denials that his claim was a statutory refund claim, a November 6, 1991 letter from petitioner's attorney to an assistant attorney general constituted an "informal" refund claim made pursuant to *N.J. Stat. Ann.* § 54A:9-8(a), which was timely with respect to a single payment of $71,031.58, made by Antar on December 7, 1989.

Following the decision on the cross-motions, the only count of the amended complaint which remained was that claiming a violation of due process, which the court had ruled

was timely with respect to the payment made by Antar on December 7, 1989, and the case was tried on that single count of the amended complaint. None of the pretrial orders entered in the action listed as a legal or factual issue to be resolved by the court any claim for refund based on the statutory definition of residency, *N.J. Stat. Ann.* §54A:1-2(m).

Contrary to petitioner's assertion that he demonstrated at trial that Antar did not derive any income from any source within New Jersey, petitioner did not trace the source of any of the income reported as taxable by Antar. Moreover, one of petitioner's attorneys, the sole witness at trial, admitted that Antar and his father owned real property in New Jersey which was leased to the Crazy Eddie business, and that several of the Crazy Eddie Stores were located in New Jersey. Petitioner also introduced a separation agreement between Antar and his former wife, indicating ownership of a New Jersey residence.

Following trial and the submission of post trial briefs, the trial court rendered a written decision dated May 20, 1997, determining that petitioner had failed to prove that the State had violated due process in retaining the gross income tax payments voluntarily paid to it by Antar. The court also rejected petitioner's claim, raised for the first time in his post-trial brief, that Antar was deprived of the privileges and immunities of a citizen of New Jersey because the New Jersey Gross Income Tax Act fails to provide an unlimited time for a recalculation of the New Jersey income tax owed by nonresidents upon a readjustment of tax by the state of residence. See *N.J. Stat. Ann.* § 54A:4-1(e).

The petitioner raised the issue of his entitlement to a refund based on the statutory definition of residency for the first time in his appeal to the Appellate Division of the Superior Court of New Jersey. That court affirmed the judgment of the trial court on December 4, 1998, for the reasons stated by the trial court in its written opinions of October 18, 1994, March

7, 1995 [1] and May 20, 1997. By order entered February 24, 1999, the Supreme Court of New Jersey denied the petition for certification, and by corrected order entered February 26, 1999, also dismissed petitioner's notice of appeal.

SUMMARY OF ARGUMENT

At its core, this case is about an untimely claim for refund of a State income tax, petitioner's unsuccessful attempt to avoid the bar of the statute of limitations by artful pleading, and a belated attempt to recover from that miscalculation by putting forth a new theory of the case on appeal by arguing that, as a constitutional matter, the statutory definition of residency expands and defines the minimum connections necessary to support the State's retention of Antar's tax payments consistent with due process.

Simply stated, the State did not impermissibly reach beyond its borders to assert its jurisdiction to tax Antar. Rather, Antar subjected himself to New Jersey's taxing jurisdiction by filing as a New Jersey resident and his due process rights were not violated by the State's retention of those income tax payments.

Similarly, petitioner's argument that New Jersey deprives nonresidents of the privileges and immunities it affords to its own citizens is an alternative attempt to avoid the bar of the statute of limitations and is also without merit. Where the New Jersey Gross Income Tax Act taxes residents on income earned within and outside of the State, and where it does not tax nonresidents on income earned outside of New Jersey at all, it is not required to provide to nonresidents as well as to residents an unlimited period of time in which to claim a recomputation

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[1] The March 7, 1995 opinion is not relevant to the issues raised in the petition.

of New Jersey tax liability based on a credit for tax imposed by another jurisdiction on income sourced in that jurisdiction.

Even if plaintiff had established that Antar was a nonresident, and that he had paid tax on income not subject to tax by New Jersey -- either intentionally to defraud the State of New York, as petitioner charges, or because of a mere mistake -- the sole remedy is the statutory refund claim, *N.J. Stat. Ann.* §54A:9-8(a), and such a claim must be made within the time provided by that statute.

REASONS FOR DENYING THE WRIT

A. THE STATE COURTS CORRECTLY HELD THAT NEW JERSEY'S RETENTION OF TAX MONIES VOLUNTARILY PAID BY A PERSON DECLARING HIMSELF A RESIDENT OF THE STATE DID NOT VIOLATE DUE PROCESS.

1. Contrary to the Characterization of the Due Process Claim Contained in the Petition, Petitioner's Claim for a Turnover of Antar's Tax Payments Was Not Based on the Statutory Definition of Residency Set Forth in *N.J. Stat. Ann.* §54A:1-2(m) .

The State has never denied that the petitioner made a "claim" for a turnover of Antar's tax payments at some time following the October 31, 1991 meeting between his attorney and representatives of the State. The petition fails to make clear, however, that throughout the proceedings in the New Jersey courts, petitioner insisted his claims were wholly equitable, flatly denied that his claim was in the nature of a tax refund, and contended that the statutory remedy for a refund of gross income tax payments, *N.J. Stat. Ann.* §54A:9-8(a), had no application to this matter.

The reasons for petitioner's legal strategy are apparent. *N.J. Stat. Ann.* §54A:9-8(a) provides that a claim for credit or

refund of an overpayment of income tax must be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires later. The only payment for which petitioner has ever been able to demonstrate that a claim had been timely made was a payment of $71,031.58 (a relatively insignificant percentage of the millions sought by the petitioner), on December 7, 1989.

Consistent with the position that he was not making a tax refund claim, petitioner did not plead and the case was not tried on the basis that a refund was required because Antar did not meet the statutory definition of "resident," *N.J. Stat. Ann.* §54A:1-2(m), and the income in issue was, therefore, not subject to tax. *See N.J. Stat. Ann.* §54A:5-5; §54A:5-8. Had petitioner asserted such a claim, he would have effectively conceded that his claim was for a "tax refund" and that the statute of limitations was applicable.

2. *N.J. Stat. Ann.* §54A:9-8(a) Is the Exclusive Remedy for Tax Refunds and the Limitations Period Established by That Statute May Not Be Tolled.

In the mistaken belief that the statute of limitations did not apply to constitutional claims, petitioner asserted that there was no nexus or minimal connection between Antar and the State that would give rise to any right to tax Antar's income, and that the State's retention of and refusal to turn over Antar's tax payments to petitioner constituted a violation of due process. The trial court correctly held that, as a matter of New Jersey law, *N.J. Stat. Ann.* §54A:9-8(a) is the exclusive remedy for a refund of monies paid as gross income taxes.

Petitioner asks this Court to overrule the New Jersey courts with respect to the well-established principle of State law that tax refund claims must be filed in a timely fashion as a jurisdictional matter. *See F.M.C. Stores Co. v. Borough of Morris Plains*, 100 *N.J.* 418, 424-425, 495 *A.2d* 1313, 1316-

17 (1985), and cases collected therein. He therefore disputes the trial court's reliance upon *Continental Trailways v. Director, Division of Motor Vehicles*, 102 *N.J.* 526, 509 *A.2d* 769 (1986), *cert.* dism., 481 *U.S.* 1001, 107 *S.Ct.* 1636, 95 *L.Ed.2d* 195 (1987). That case clearly supports the proposition for which it was cited: namely, that the court could not consider any refund claim not filed within the time provided by statute. In the case of the Gross Income Tax Act, the result is further compelled by *N.J. Stat. Ann.* §54A:9-8(d), which provides that no refund or credit of gross income tax may be made after the expiration of the period of limitations, and that "[n]o period of limitations specified in any other law shall apply to the recovery of moneys paid in respect of taxes under this act."

New Jersey was clearly entitled to insist on compliance with its refund statute. This Court has acknowledged the states' strong interest in financial stability in the context of refund claims, *McKesson Corp. v. Division of Alcoholic Beverages*, 496 *U.S.* 18, 37, 110 *S.Ct.* 2238, 2250, 110 *L.Ed.2d* 17, 36 (1990), and has recognized that a state may protect itself from financial instability by enforcing relatively short statutes of limitations applicable to refund actions. *Id.*, 496 *U.S.* at 45, 110 *S.Ct.* at 2254, 110 *L.Ed.2d* at 41.

The trial court, as affirmed by the Appellate Division, also rejected petitioner's contention that the statute of limitations should be equitably tolled on account of what petitioner asserted was his "exceptional" status. As a matter of State law, the court found that the Gross Income Tax Act's statute of limitations could not be equitably tolled. Moreover, the court adopted the common law rule that a receiver takes the property and rights of the person for whom he was appointed in the same condition and subject to the same equities that existed before the appointment. Consequently, the receiver's right to a refund rose no higher than Antar's right, and a statute of limitation defense good against Antar was also good against the receiver. In sum, the petitioner's claim for a refund could

be heard only with respect to that single payment made within the time required by *N.J. Stat. Ann.* 54A:9-8(a).

3. The Requirements of Due Process Are Not Co-extensive with and Are Not Defined by the Gross Income Tax Act's Definition of "Resident" and Antar's Voluntary Filing and Payment of Tax as a Resident of this State Established the Minimum Contacts with the State Such That the State's Retention of the Tax Money Did Not Offend Traditional Notions of Fair Play and Substantial Justice.

The trial court, as affirmed by the Appellate Division, found that the petitioner failed to establish that Antar lacked the minimum contacts with New Jersey sufficient to support taxation by the State consistent with due process. Petitioner has therefore attempted to re-shape for the Court (as he did before the Appellate Division) his due process claim into one based on the definition of "resident" contained in the Gross Income Tax Act, *N.J. Stat. Ann.* §54A:1-2(m). Petitioner argues, in effect, that whether the retention of tax at issue here comports with the Due Process Clause, depends upon whether Antar was a statutory resident.

That is plainly not the law. Consistent with due process, jurisdiction to tax was conferred on New Jersey when Antar filed resident tax returns and voluntarily paid tax as if a resident of the State, and the trial court so held. Even if Antar was a nonresident, and even if the income on which tax was paid was derived from the sales of Crazy Eddie stock, Antar's elective payments of tax to New Jersey on such income without compulsion of statute and without involuntary collection of such tax by the State does not constitute a violation by the State of Antar's due process rights. Antar voluntarily subjected himself to the taxing jurisdiction of this State, notwithstanding his residency or other connections to New Jersey, and there is, therefore, no violation of due process.

New Jersey does not tax the income of nonresidents earned outside the State. The gross income tax is imposed on New Jersey gross income, *N.J. Stat. Ann.* §54A:2-1, which is defined as consisting of several categories of income including, among others, salaries and other remuneration received for services rendered (*N.J. Stat. Ann.* §54A:5-1(a)); net profits from business (*N.J. Stat. Ann.* §54A:5-1(b)); and net gains or income from disposition of property (*N.J. Stat. Ann.* §54A:5-1(c)). The income of both residents and nonresidents is subject to the tax, but New Jersey taxes nonresidents only to the extent their income is derived from sources within the State. *N.J. Stat. Ann.* §54A:5-5, *N.J. Stat. Ann.* §54A:5-8.

A state may tax all of the income of its residents wherever earned, *Oklahoma Tax Commission v. Chickasaw Nation*, 515 *U.S.* 450, 462-463, 115 *S.Ct.* 2214, 2222, 132 *L.Ed.2d* 400, 412 (1995); *New York ex rel. Cohn v. Graves*, 300 *U.S.* 308, 312-313, 57 *S.Ct.* 466, 467-468, 81 *L.Ed.* 666 (1937), and it may tax the income of nonresidents earned within the state's borders. *Shaffer v. Carter*, 252 *U.S.* 37, 57, 40 *S.Ct.* 221, 227, 64 *L.Ed.* 445, 458 (1920). A state's tax comports with due process where it does not assume any power or jurisdiction to tax nonresidents with respect to income derived from property or business beyond its borders. *Shaffer v. Carter*, *supra*, 252 *U.S.* at 53-54, 40 *S.Ct.* at 226, 64 *L.Ed.* at 457.

New Jersey does not tax nonresidents on gains from the disposition of intangible personal property unless that property is employed in a trade, profession, occupation or business carried on in this State. *N.J. Stat. Ann.* §54A:5-8(4). If Antar was, in fact, a nonresident of New Jersey and if his shares of stock in Crazy Eddie, Inc. were unrelated to his trade, profession, occupation or business conducted in New Jersey, the State did not require or demand the payment of gross income taxes on the gains realized from the sale of his stock.

Whether a state may impose a tax on a person without violating due process centers around the same considerations that determine whether a state may impose *in personam* jurisdiction. *Quill Corp. v. North Dakota*, 504 *U.S.* 298, 307, 112 *S.Ct.* 1904, 1910-11, 119 *L.Ed.2d* 91, 103-04 (1992). In making such an inquiry, the Court focuses on whether a defendant's contacts with a forum make it reasonable to require him to defend a suit in that state. *Quill*, 504 *U.S.* at 307, 112 *S.Ct.* at 1910, 119 *L.Ed.2d* at 103. Due process is satisfied if a person has certain minimum contacts with a state such that maintenance of a suit does not offend traditional notions of fair play and substantial justice. *Ibid.*, quoting *International Shoe Co. v. State of Washington*, 326 *U.S.* 310, 316, 66 *S.Ct.* 154, 158, 90 *L.Ed.* 95, 102 (1945).

"[T]he Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King Corporation v. Rudzewicz*, 471 *U.S.* 462, 473-74, 105 *S.Ct.* 2174, 2182-83, 85 *L.Ed.*2d 528, 541 (1985)(citations omitted). The State's receipt and retention of Antar's tax payments simply cannot be said to offend traditional notions of fair play and substantial justice where the State neither compelled nor required tax payments, which were voluntarily made by Antar for reasons known only to him. The State did not seek to impose its jurisdiction to tax on Antar; rather, he conferred that jurisdiction on the State and neither he, nor plaintiff, can now complain that Antar's due process rights were violated.

B. New Jersey Does Not Deprive Nonresidents of the Privileges and Immunities of a Citizen of the State Where it Provides Only Residents with an Unlimited Period of Time to Claim a Further Credit Against New Jersey Tax on Income Earned in and Taxed by Another Jurisdiction, Where Such Income of Nonresidents Is Not Subject to Tax at All by New Jersey

If Antar was not a resident of New Jersey, and his income earned outside the State was not subject to tax by New Jersey, *N.J. Stat. Ann.* §54A:5-5; *N.J. Stat. Ann.* §54A:5-8, then his payments constitute a mere overpayment of tax subject to the refund provisions of *N.J. Stat. Ann.* §54A:9-8(a) and its applicable limitations period. Petitioner nevertheless contends that Antar should have been provided an unlimited time to claim a refund in the form of a readjustment of a tax credit allowed a resident pursuant to *N.J. Stat. Ann.* §54A:4-1(e), and that because he was not, he was denied the privileges and immunities of a citizen of New Jersey.

Whether a state taxing statute violates the Privileges and Immunities Clause, *U.S. Const.* Art. IV s 2, cl. 1, depends upon whether there is a substantial reason for the difference in treatment between residents and nonresidents and whether the discrimination against nonresidents bears a substantial relationship to the state's objective. *Lunding v. New York Tax Appeals Tribunal*, 522 *U.S.* 287, ___, 118 *S.Ct.* 766, 774, 139 *L.Ed.2d* 717, 729-30 (1998). New Jersey's Gross Income Tax subjects both residents and nonresidents to tax on income earned within New Jersey, and no credit is available to either with respect to New Jersey income. The credit in issue is given to residents with respect to income earned outside New Jersey, upon which New Jersey does not subject nonresidents to tax at all. The unavailability to nonresidents of a credit against a tax on income earned outside of New Jersey is, accordingly, not an inequality that results from hostile discrimination, but incidentally in the application of a tax system that is not arbitrary in its classification. *Ibid.* The

resident credit provisions, accordingly, do not contravene the Privileges and Immunities Clause.

As noted earlier, a state may tax all of the income of its residents wherever earned, *Oklahoma Tax Commission v. Chickasaw Nation*, 515 *U.S.* 450, 462-463, 115 *S.Ct.* 2214, 2222, 132 *L.Ed.2d* 400, 412 (1995); *New York ex rel. Cohn v. Graves*, 300 *U.S.* 308, 312-313, 57 *S.Ct.* 466, 467-468, 81 *L.Ed.* 666 (1937), and it may tax the income of nonresidents earned within the State's borders. *Shaffer v. Carter*, 252 *U.S.* 37, 57, 40 *S.Ct.* 221, 227, 64 *L.Ed.* 445, 458 (1920).

The credit provided to New Jersey residents by *N.J. Stat. Ann.* §54A:4-1(a) is for tax paid to other jurisdictions which, like New Jersey, may validly tax nonresidents only with respect to income which is derived from sources within the borders of that taxing jurisdiction. *N.J. Stat. Ann.* §54A:4-1(e) permits a resident taxpayer to notify the Division of Taxation if the second taxing jurisdiction later readjusts the tax due to it, which readjustment would result in a larger or smaller credit against the New Jersey tax than originally taken. This redetermination of tax (and possible refund) may be made without regard to the statute of limitations set forth in *N.J. Stat. Ann.* §54A:9-8(a), and it is for that reason that petitioner characterizes the money he seeks as a readjustment of tax by another jurisdiction.

The purpose of the credit is to minimize or avoid double taxation on income that is subject to tax by both New Jersey and another jurisdiction. *Ambrose v. Director, Div. of Taxation*, 198 *N.J. Super.* 546, 552, 487 *A.2d* 1274, 1278 (App. Div. 1985); *Jenkins v. Taxation Div. Director*, 184 *N.J. Super.* 402, 408, 446 *A.2d* 217, 220-221 (Tax 1982).

Consequently, New Jersey imposes a tax, without credit, on the New Jersey source income of both its residents and nonresidents. It additionally taxes its residents with respect to non-New Jersey source income, for which a credit may be

granted if another jurisdiction has taxed the same income. New Jersey never imposes a tax on the non-New Jersey source income of nonresidents and, therefore, makes no provision for credit for tax paid by nonresidents with respect to income sourced in and taxed by other jurisdictions, or for readjustment of tax paid to New Jersey if another jurisdiction thereafter requires the nonresident to pay additional tax on non-New Jersey source income. *Estate of Guzzardi v. Director, Div. of Taxation*, 15 *N.J.Tax* 395, 406 (Tax 1995), *aff'd* 16 *N.J. Tax* 374 (App. Div. 1996); *see also*, *Jenkins v. Taxation Div. Director*, *supra*, 184 *N.J. Super.* at 409, 446 *A.2d* at 221 (the intent of the Act is to avoid double taxation of non-New Jersey source income, but not to relinquish New Jersey tax on income earned in New Jersey).

Consistent with the Privileges and Immunities Clause, a state may limit deductions for expenses taken by a nonresident based on the relationship between those expenses and in-state property or income. *Lunding*, *supra*, 522 *U.S.* at ___, 118 *S.Ct* at 776, 139 *L.Ed.2d* at 732; *Shaffer v. Carter*, *supra*, 252 *U.S.* at 56-57, 40 *S.Ct.* at 227, 64 *L.Ed.* at 458-459. The reasoning is the same with respect to credits.

There is, therefore, no illegal discriminatory treatment of nonresidents by the Act. Its treatment of residents and nonresidents is exactly the same, except that residents are additionally taxed on non-New Jersey source income (for which they are eligible for credit against New Jersey taxes) while nonresidents are not. The resident credit which plaintiff alleges discriminates against nonresidents is applied only with respect to income of nonresidents which is not taxed at all by New Jersey.

If a nonresident pays tax on non-New Jersey source income, whether by mistake or, as alleged here, as a result of a scheme to avoid payment of taxes in another jurisdiction, that is no more than a simple overpayment comparable to tax paid by any taxpayer, whether resident or nonresident, on income

not subject to tax. *See, e.g., N.J. Stat. Ann.* §54A:6-1 *et seq.*, for income excludable from the tax. A remedy for such overpayments is provided pursuant to *N.J. Stat. Ann.* §54A:9-8(a), for which a claim must be timely filed.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Dated: June 22, 1999

APPENDIX

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION:ESSEX COUNTY
DOCKET NO. C-102-92

CHARLES C. CARELLA, Trustee/
Receiver Under Orders of the United
States District Court for the District
of New Jersey,

Plaintiff,

v.

THE STATE OF NEW JERSEY,
DEPARTMENT OF TREASURY,
By Samuel Crane, Treasurer,

Defendant.

MEMORANDUM
OPINION

Decided: October 18, 1994

Dennis F. Gleason for plaintiff (Carella, Byrne, Bain,
Gilfillan, Cecchi, Stewart & Olstein, attorneys)

Gail L. Menyuk for defendant (Deborah T. Poritz,
Attorney General of New Jersey)

CRABTREE, J.T.C., t/a

The parties have filed cross motions for summary judgment in this bizarre litigation, which arose from New Jersey gross income tax returns filed for the years 1984 through 1987 by Eddie Antar ("Crazy Eddie") as a New Jersey resident. The taxes paid with those returns aggregate $2,359,820. In addition, the undisputed facts show that Antar made New Jersey gross income tax payments, on December 7, 1989, of $8,652.60 and $62, 378.98 for 1984 and 1986, respectively.

Plaintiff is the receiver/trustee in an enforcement action commenced by the Securities and Exchange Commission (SEC) against Eddie Antar and others in the United States District Court for the District of New Jersey. In that action, the SEC seeks to compel disgorgement of allegedly illegal profits from the defendants. Plaintiff was appointed receiver/trustee of all the assets of Eddie Antar wheresoever situated by orders of the Honorable Nicholas H. Politan, United States District Judge, entered January 24, 1990 and March 8, 1990. Plaintiff commenced the instant action on March 25, 1992 by filing a complaint seeking to recover from defendant, State of New Jersey and its Treasury Department, New Jersey gross income taxes paid as aforesaid by Eddie Antar for the years 1984 through 1987.

In an opinion dated January 13, 1993, this court denied defendant's motion to dismiss and pointed out that plaintiff would be permitted to allege and prove the filing of a refund claim, or the existence of facts which the court could construe as the filing of a refund claim, and the point in time at which a refund claim would be deem filed. The court also indicated that plaintiff, through the discovery process, and under certain security restrictions imposed by a protective order, could ascertain the dates returns were filed, whether filing extensions were granted, when tax payments were made, and when refund claims were denied, if such claims were filed.

Thereafter, defendant moved again for summary judgment, and plaintiff filed a cross motion for leave to amend his

complaint. Defendant's motion was supported by an extensive certification setting forth dates and amounts of tax payments made by Antar. These data were computer-generated. In an oral opinion rendered on March 26, 1993, this court denied defendant's summary judgment motion on the ground that a proper foundation for the introduction of computer-generated evidence could be laid only at trial, and not in a certification, citing *Monarch Federal Savings & Loan Ass'n v. Genser*, 156 *N.J. Super* 107 (Ch. Div. 1977) and *State v. Swed*, 255 *N.J. Super.* 228 (App. Div. 1992).

At the same time, the court granted plaintiff's motion to file an amended complaint, which was done on April 14, 1993. The complaint incorporated the four original counts and added four more. The Fifth Count alleged plaintiff's entitlement to a credit for taxes owed by Antar to the State of New York. The Sixth Count alleged plaintiff's right to a refund of New Jersey gross income taxes paid by Antar on December 7, 1989, for tax years 1984 and 1986, aggregating $71,031.58, together with interest. In the same count, plaintiff accused defendant of a wrongful concealment of their dates and amounts of such tax payments and demanded damages, including exemplary damages, along with attorneys' fees for such concealment.

The Seventh Count sought restitution in an amount equal to all funds paid to defendants by Antar as taxes on the ground of unjust enrichment, *i.e.*, defendants received and retained the funds without having given valuable consideration therefor, and, plaintiff asserts, it would be unjust for defendants to retain those funds to the detriment of others having equal or greater rights thereto. The Eighth Count alleged that no nexus or minimal connection existed between Antar and defendant, State of New Jersey, which would give rise to any right to tax income derived by Antar during his periods of residency and domicile outside of New Jersey, and that defendants' retention and refusal to turn over sums paid by Antar was wrongful and in violation of the due process clause of the United States Constitution.

Defendants move for partial summary judgment on the issue of whether they had had a duty to disclose to plaintiff tax return information filed with them by Eddie Antar. Defendants also move for partial summary judgment regarding those solely legal issues raised in an earlier motion which this court has not yet decided, namely, whether the tax refund statute, *N.J.S.A.* 54A:9-8(a) is plaintiff's only remedy, and whether the statute of limitations contained in the refund statute may be equitably tolled or is subject to the discovery rule.

Plaintiff, by way of cross motion, seeks summary judgment on two principal grounds. First, assuming, *arguendo*, that Antar was a New Jersey resident for the tax years in question, plaintiff is entitled to a readjustment of Antar's 1984, 1985 and 1986 income tax returns, pursuant to *N.J.S.A.* 54A:4-1, as a result of additional tax liabilities fixed against Antar by the State of New York. Secondly, if it is defendants' position that Antar was not a New Jersey resident in 1984, 1985 and 1986, then defendants, under the due process clause of the United States Constitution, may not tax Antar for non-New Jersey sourced income; and to that extent, that plaintiff is entitled to a return of taxes paid by Antar to defendants for those years.

Law of the Case

Plaintiff first argues that the arguments advanced by defendants relate to issues heretofore addressed and decided by this court in ruling on prior motions, and thus, that the doctrine of law of the case forecloses consideration of defendants' arguments and requires that defendants' present motion be denied.

To be sure, under the law of the case doctrine, decisions of law made in a case should be respected by all other lower or equal courts during the pendency of the case. *Lanzet v. Greenberg*, 126 *N.J.* 168, 192 (1991). However, a court is never irrevocably bound to abide by its prior ruling in the same case. *West Point Island Civic Ass'n v. Township Committee of*

Dover Tp., 54 *N.J.* 339, 344 (1969). As the Appellate Division observed in *State v. Hale*, 127 *N.J. Super.* 407 (App. Div. 1974):

> It has been generally stated that the "law of the case" doctrine "applies to the principle that where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit...." This rule is based upon the sound policy that when an issue is once litigated and decided during the course of a particular case, that decision should be the end of the matter.... "Law of the case" most commonly applies to the binding nature of appellate decisions upon a trial court if the matter is remanded for further proceedings, or upon a different appellate panel which may be asked to reconsider the same issue in a subsequent appeal.... A final judgment is required in order to sustain an application of the rule, just as it is for the kindred rule of *res judicata*....
>
> The doctrine of "law of the case" is also applied to the question of whether or not a decision made by a trial court during one stage of the litigation is binding throughout the course of the action.... The use of the doctrine in this situation avoids repetitious litigation of the same issue during the course of a single trial. *With respect to this aspect of "law of the case" it has been generally stated that "the 'law of the case' concept is merely a non-binding decisional guide addressed to the good sense of the court in the form of 'a cautionary admonition' against relitigation 'when the occasion demands it....'"* This distinction between the doctrine of "law of

> the case" and *res judicata* is readily apparent: "one directs discretion: the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission...." *"Law of the case" therefore operates as a discretionary rule of practice and not one of law....* (emphasis added) [127 *N.J. Super.* at 410-411.]

It is not necessary for this court to determine whether the issues raised in defendants' motion for partial summary judgment have already been ruled upon. What matters is that addressing the issues now and dealing with counsel's arguments will serve to narrow the issues at trial and thus expedite the disposition of this complex litigation. Thus, it appears that the doctrine of law of the case is one of policy, not of law, that its invocation is discretionary and is to be flexibly applied in the interests of justice. See *State v. Reldan*, 100 *N.J.* 187, 205 (1985).

Accordingly, even if the issues raised by defendants' motion for partial summary judgment have been ruled upon in deciding earlier motions, I am satisfied that the interests of justice and particularly the expeditious disposition of this litigation are promoted by dealing with the issues raised in defendants' motion and plaintiff's cross motion.

Therefore, the court will address the arguments of counsel and decide the legal issues raised to the end that the issues to be resolved at trial may be narrowed.

N.J.S.A. 54A:9-8(a): Is it the exclusive remedy for refund of taxes paid?

The remedy made available by the Legislature for recovery of income taxes paid is *N.J.S.A.* 54A:9-8(a) which provides:

> Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within 2 years from the time the tax was paid. If the claim is filed within the 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the 3 years immediately preceding the filing of the claim plus the period of any extension of time for filing the return. If the claim is not filed within the 3-year period, but is filed within the 2-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim. Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed.

Taxation is a sovereign power, which, under the New Jersey Constitution, is vested in the Legislature. *N.J. Const.* (1947), Art. IV, §6, ¶1. Only the Legislature can create a remedy for the refund of taxes paid by Antar, and the Legislature has, in fact, created such a remedy by the enactment of *N.J.S.A.* 54A:9-8(a).

The Legislature possesses broad discretion with respect to taxation. *Lehnhausen v. Lake Shore Auto Parts Company*, 410 *U.S.* 356, 93 *S.Ct.* 1001, 35 *L.Ed.* 2d 351 (1973); *Mahwah v. Bergen County*, 3 *N.J. Tax* 513 (Tax 1981). Subject to constitutional restraints, the Legislature is supreme in its exclusive field of taxation. *Galloway Tp. v. Dorflinger*, 2 *N.J. Tax* 358, 363 (Tax 1981).

The need for such broad discretion is particularly evident when recovery is sought for taxes already paid, because government has relied on the funds collected in fashioning its annual budgets. *Salorio v. Glaser*, 93 *N.J.* 447 (1983);

Messner v. Union County, 34 *N.J.* 233 (1961). "Public policy discourages suits for the refund of taxes erroneously paid or illegally collected." *Continental Trailways, Inc. v. Director, Division of Motor Vehicles*, 102 *N.J.* 526, 548 (1986), *cert. den.* 481 *U.S.* 1001, 107 *S.Ct.* 1636, 95 *L.Ed.* 2d 195 (1987).

The refund statute, *N.J.S.A.* 54A:9-8(a), quoted above, makes it clear that the Legislature meant to limit strictly the availability of a refund claim to those taxpayers who filed claims within the prescribed period. Any claim that *N.J.S.A.* 54A:9-8(a) does not apply here runs afoul of the policy behind relatively short limitation periods provided by the Legislature for recovering taxes, which is based on "the need for predictability of revenue by public agencies," *McCullough Transportation Co. v. Division of Taxation*, 113 *N.J. Super.* 353, 360 (App. Div. 1971), and on the recognition that otherwise, "governments would be subject to substantial liability from refunds of...unconstitutional taxes." *Continental Trailways, Inc. v. Director, Division of Motor Vehicles*, *supra*, at 548.

This policy recognizes the essential nature of revenues to run the government and the latter's corresponding right to rely upon money paid as taxes once the period of limitations has expired. The point is not that the State relied upon the particular tax payments made by Antar, but rather, that once the period of limitations prescribed by the Legislature has run, the State can assume that its overall revenues are secure. As the United States Supreme Court once declared:

> It is upon taxation the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the

> operations of government and thereby cause serious detriment to the public. *Dows v. City of Chicago*, 11 *Wall.* 108, 110, 20 *L.Ed.* 65 (1871)

Thus, the statutory prescription for tax refund claims is exclusive. This conclusion is supported not only by sound policy considerations pertaining to the protection of the public fisc, as is apparent from the preceding discussion, but by sound legal principles, as well. There is no common law right to recover taxes alleged to have been erroneously paid; the right to any refund of such payments is controlled exclusively by statute, even if the taxes were paid under an unconstitutional statute. *Continental Trailways, Inc. v. Director, Division of Motor Vehicles, supra.*

It necessarily follows, then, that plaintiff's equitable claims of unjust enrichment, his demand for the imposition of a constructive trust and other equitable claims, are irrelevant to the issues in this case. See *Dow Chemical Co. v. Dept. of Revenue*, 224 *Ill. App.* 3d 263, 586 *N.E.* 2d 516 (Ill. App. Ct. 1991), where the court declined to apply equitable principles where the statutory limitation on refund claims had expired.

Equitable Tolling

Plaintiff argues that the circumstances of this case require the application of equitable tolling, *i.e.*, the statute of limitations on tax refunds must be tolled so as to permit plaintiff to recover taxes paid by Antar to defendants, even though the time for filing tax refund claims may have otherwise expired.

Tolling has two aspects. The first is whether plaintiff's appointment as receiver/trustee in the SEC enforcement action tolls the statute of limitations on refund claims. This aspect of the tolling issue can be summarily disposed of.

In non-tax areas of the law, it is well settled that the bar of the statute of limitations applies with equal force to a receiver and to the person for whom a receiver is appointed; if the statute has run prior to the appointment, the receiver has no claim. *Armstrong v. McAlpin*, 699 *F.*2d 79 (2d Cir. 1983); *O'Connell v. Chicago Park Dist.*, 34 *N.E.* 2d 836 (Ill. 1941); *Rohrig v. Whitney*, 12 *N.W.* 2d 866 (Iowa 1944). The rule is simply one aspect of the common law rule that a receiver takes the property and rights of the person for whom he was appointed in the same condition and subject to the same equities that existed before his appointment, and any defense good against the original party is good against the receiver. *E.W. Bailey & Co. v. Groton Mfg. Co.*, 34 *A.* 2d 178 (Vt. 1943); *Kings, Inc. v. Maryland Casualty Co.*, 88 *S.W.* 2d 456 (Tenn. 1935); *Clark, Receivers* (Supp. 1968-69) §578.

The rule has been applied *pari passu* to tax refund claims in bankruptcy. The taxpayer's bankruptcy does not toll the statute of limitations on tax refund claims. *In re Clayton Magazines*, 77 *F.*2d 852 (2d Cir. 1935); *In re Qual Krom South, Inc.*, 119 *B.R.* 327 (Bankruptcy Ct., S.D. Fla. 1990).

Thus, the statute of limitations on claims for refund of New Jersey gross income tax is not tolled by plaintiff's appointment.

The second aspect of the tolling issue is the principle of equitable tolling, which plaintiff vigorously contends should be applied in this case to ameliorate the strict statutory rules governing the time within which tax refund claims must be filed.

Plaintiff cites a number of cases where courts have applied equitable tolling to claims against government. Among them are *White v. Violent Crimes Bd.*, 76 *N.J.* 368 (1978), where the New Jersey Supreme Court held that, in exceptional circumstances, the statute of limitations may be tolled; *Irwin v. Veterans Admin.*, 498 *U.S.* 89, 111 *S.Ct.* 453 112 *L.Ed.* 2d 435 (1990), *rehearing denied* 112 *L.Ed.* 2d 865 (1991), a case

involving a charge of wrongful discharge because of the claimant's race and disability, wherein the United States Supreme Court rejected the claimant's argument for equitable tolling of the statute of limitations dealing with appeals from EEOC determinations but observed in *dicta* that Congress had intended the "same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States," 112 *L.Ed.* 2d, at 444.

Plaintiff also cites federal cases dealing with the application of equitable tolling to federal tax refund claims. He points out, correctly, that with the dearth of authority construing the provisions of *N.J.S.A.* 54A:9-8(a), we may look to federal law, because parallels exist between state and federal tax legislation. See *Hellman v. Taxation Div. Director*, 2 *N.J. Tax* 240, 250 (Tax 1981). (The provision of the Internal Revenue Code dealing with limitations on federal tax refund claims is §6511(a)[1], the language of which is virtually identical to the language of *N.J.S.A.* 54A:9-8(a)).

Plaintiff cites *Wiltgen v. United States*, 813 *F.Supp.* 1387 (N.D. Iowa 1992); *Scott v. United States*, 795 *F.Supp.* 1028 (D. Hawaii 1992) and *Johnsen v. United States*, 758 *F.Supp.* 834 (E.D.N.Y. 1991). In all three of the cases, the court applied the doctrine of equitable tolling to extend the time prescribed by Code §6511 for the filing of federal tax refund claims by mentally incompetent taxpayers. The court in all three cases relied upon the *dicta* of the *Irwin* case to the effect that equitable tolling of statutes of limitation should apply to claims against the government as well as to claims against private parties.

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[1] §6511(a) IRC provides, pertinently: "Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid...."

No Court of Appeals decision supports the decisions in *Scott*, *Wiltgen* and *Johnsen*. To the contrary, Courts of Appeal for the First, Third and Eleventh Circuits have held that equitable tolling is inapplicable to federal tax refund claims.

In *Krieger v. United States*, 539 *F.*2d 317 (3d Cir. 1976), a pre-*Irwin* decision, the court rejected the tolling argument, saying, at pp. 320-321:

> This [tolling] argument initially runs afoul of the well-established principle that statutes of limitation applicable to suits against the government are conditions attached to the sovereign's consent to be sued and must be strictly construed.... Unlike general statutes of limitation which govern independently existing causes of action between private parties, the timeliness requirement at issue here is not procedural, or "remedial," but jurisdictional.... These principles are as applicable to tax refund suits as to any other suit against the sovereign....

In a post-*Irwin* setting, the Court of Appeals for the Eleventh Circuit rejected the equitable tolling argument, as it pertained to Code §6511(a), in *Vintilla v. United States*, 931 *F.*2d 1444 (11th Cir. 1991), relying upon *Krieger* and *United States v. Dalm*, 494 *U.S.* 596 110 *S.Ct.* 1361 108 *L.Ed.* 2d 548 (1990). The court of Appeals for the First Circuit, in *Oropallo v. United States*, 994 F.2d 25 (1st Cir. 1993) *cert. den.* __ U.S. __ 114 *S.Ct.* 705 126 *L.Ed.* 2d 671 (1994), also declined to apply the doctrine of equitable tolling to extend the statute of limitations on the filing of a federal tax refund claim. The taxpayer had been incarcerated and also suffered carbon monoxide poisoning which, he averred, left him "extremely incapacitated and unable to function competently for several years." Furthermore, he went on, since his imprisonment in 1985, prison authorities had impeded his legal efforts on his

behalf, and, although he had informed the United States Post Office of address changes while incarcerated, he had no notice of his failure to file his 1983 income tax return until mid-1989.

The court alluded to the *Irwin* decision but also cited *Dalm* for the proposition that the United States could be sued only by virtue of its waiver of its sovereign immunity and that the terms of any such waiver had to be strictly construed. 994 *F.*2d at 28. The court went on to draw an analogy with *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, __ *U.S.* _ 111 *S.Ct.* 2773, 115 *L.Ed.* 2d 321 (1991), a case which, like *Dalm*, was decided subsequent to *Irwin*. In *Lampf*, the Supreme Court declined to apply equitable tolling to extend the statute of limitations on private actions cognizable under §10(b) of the Securities Exchange Act of 1934. The statute of limitations in question was prescribed under §9(e) of the 1934 Act and prohibited any action for a violation of §10(b) if not brought within one year after discovery of the facts constituting the violation and within three years after such violation. The First Circuit compared the one and three-year periods of §9(e) with §6511 of the Internal Revenue Code and concluded its analysis with the following:

> Here, Oropallo's 1983 taxes were deemed paid on April 15, 1984, and his refund claim was timely filed on March 19, 1990, the same day he filed his return. Under section 6511 (b)(2)(A) he may recover any taxes paid in the immediately preceding three-year period, i.e., on or after March 19, 1987. But all of the taxes Oropallo seeks to recover were paid before March 19, 1987, and thus he recovers nothing. Unquestionably, then, that date serves as an absolute cut-off point. By imposing an "outside limit" or "cut-off" on the amount of taxes which can be recovered, section 6511(b)(2)(A) operates like the three-year portion of the limitations period in *Lampf*, and thus is a

> "period of repose inconsistent with tolling." *See* ___ U.S. at ___, 111 *S.Ct.* at 2782. *See Wiltgen v. United States*, 813 F.Supp. 1387 (N.D. Iowa 1992) (calling section 6511(b)(2)(A) a "period of repose," but, without referring to *Lampf*, finding that the section could be equitably tolled under *Irwin*); *McGregor v. United States*, 225 Ct.Cl. 566, 650 *F.*2d 289 (1980) (calling the date beginning the three-year period immediately preceding the date of a refund claim the "cut-off date"). Because, together, section 6511(a) and (b)(2)(A) function like the 1-and-3-year period found inconsistent with equitable tolling in *Lampf*, we conclude that those provisions may not be equitably tolled. [994 F.2d at 31.]

In the *Dalm* case, cited in *Oropallo*, and in *Vintilla*, the Supreme Court declined to apply the doctrine of equitable recoupment (a close relative of equitable tolling) to extend the statute of limitations in the filing of a gift tax refund claim where the taxpayer had received payments in 1976 and 1977 from the brother of her deceased employer, and paid gift tax on the 1976 payment. Subsequently, after an IRS audit of the taxpayer's income tax returns for 1976 and 1977, the IRS asserted deficiencies in her income tax for those years on the ground that the payments made to her in 1976 and 1977 were not gifts but were includible in her gross income. She then petitioned the United States Tax Court for a redetermination of the deficiencies but made no claim for a credit or recoupment of the gift tax paid. The parties settled the Tax Court case for a lesser income tax deficiency than that proposed by the IRS. Immediately after she agreed to the settlement, the taxpayer filed a claim for refund of the gift tax paid in 1976. The claim was filed in November 1984, long after the limitations period prescribed by §6511(a) had expired. The Court, after restating the well-established principle that the United States, as sovereign, is immune from suit except with its consent, the

terms of which define a court's jurisdiction to entertain the suit, declared:

> For the District Court to have jurisdiction over her suit for refund, Dalm was required to file a claim for refund of the tax within three years of the time the gift tax return was filed or two years of the time the tax was paid, whichever period expires later.... There is no question but that she failed to do so. Having failed to comply with the statutory requirements for seeking a refund, she asks us to go beyond the authority Congress has given us in permitting suits against the Government. If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress. [108 L.Ed. 2d at 562]

Dalm was decided approximately nine months before *Irwin*, yet it is not mentioned in any of the opinions in Irwin. The Supreme Court in *Lampf*, citing *Irwin*, acknowledged that time limits in law suits are "customarily" subject to equitable tolling. Yet the *Lampf* court held that the time limits expressed in §9(e) of the Securities Exchange Act of 1934 were not subject to equitable tolling, observing, in this regard, that the equitable tolling doctrine is "fundamentally inconsistent with the 1-and-3-year structure." 111 *S.Ct.* at 2782.

Given the sound analysis of the First Circuit in *Oropallo* drawing a comparison between §9(e) of the 1934 Act and §6511 of the Internal Revenue Code, the conclusion that *Irwin* has no relevance to the equitable tolling doctrine as applied to tax refund claims is inescapable.

The court concludes from the foregoing that the doctrine of equitable tolling may not be applied to extend the limitation

periods prescribed by *N.J.S.A.* 54A:9-8(a) for the recovery of New Jersey gross income taxes paid.

Legal Effect of October 31, 1991 Meeting Involving Plaintiff's Counsel and Representatives of the New Jersey Attorney General's Office and Subsequent Correspondence

According to the certification of A. Richard Ross, Esq., one of plaintiff's attorneys (hereafter "Ross Certification"), plaintiff first learned of Antar's tax fraud, *i.e.*, filing New Jersey resident gross income tax returns when he was not a New Jersey resident, but a New York resident, in January 1991, when the New York State Department of Taxation and Finance (hereafter "New York") filed a tax warrant indicating New York State income taxes approximating $5.5 million dollars due from Antar for 1984, 1985 and 1986. A second New York warrant was issued in February 1991 for an additional $1,000,000 in tax for 1984 and 1985. Shortly after receiving the first tax warrant, according to Ross, plaintiff commenced an inquiry into all of Antar's income tax returns. As part of that inquiry, plaintiff examined Antar's New York and New Jersey tax records and gathered evidence to establish Antar's residence during the years in question.

Having concluded from his investigation that Antar had fraudulently declared New Jersey as his residence in order to evade payment of higher taxes to New York, plaintiff's counsel met, on October 31, 1991, with then-Assistant Attorney General Jack Sabatino, then-Deputy Attorney General Mary R. Hamill, representing the New Jersey Attorney General, and Susan Camp, representing the Division of Taxation. While the purpose of the meeting was, according to the Ross certification, formally to seek recovery of the tax payments alleged to have been fraudulently made by Antar to New Jersey, no written claim, formal or informal, was filed by plaintiff at that time.

On November 4, 1991, Hamill wrote to Ross:

> We appreciate the opportunity to discuss with you the receiver's claim against the State of New Jersey for gross income taxes paid by Eddie Antar. As agreed at our meeting on the 31st, I am sending you a list of documents that would assist us in evaluating your claim that Eddie Antar, in fact, resided in New York during the period 1984 - 1987 when he was filing New Jersey resident returns.

Thereafter, on November 6, 1991, plaintiff's counsel wrote to Sabatino requesting copies of all New Jersey gross income tax returns filed by Antar for years beginning with 1984 and all records of tax payments made, together with New Jersey returns filed for each of Antar's five children. Counsel's letter also stated:

> *Finally, this will reflect that in addition to the approximately $4,022,838 of claims discussed on October 31*, we also claim the amounts paid to the State from funds held nominally by the aforesaid children in or for the tax years 1985, 1986, 1987 and 1988, as "tax." These sums were paid to the State as if the tax obligations of the children. They were not. They are Eddie Antar's funds. (emphasis added)

Reference, once again, to cases dealing with federal tax refund claims filed pursuant to Code §6511, discloses that an oral claim for refund, even if it puts the IRS on notice, does not constitute a valid refund claim. *Vintilla v. United States*, *supra*; *Gustin v. United States*, 876 *F.*2d 485 (5th Cir. 1989). An informal written claim is acceptable. *United States v. Kales*, 314 *U.S.* 186 62 *S.Ct.* 214 86 *L.Ed.* 132 (1941). There must, however, be some written component to the claim, and a written claim submitted out of time does not retroactively ratify or revive an oral claim made before the statute of

limitations has run. *Yuen v. United States*, 825 *F.*2d 244 (9th Cir. 1989).

In this case, no written claim, even an informal one, was presented by plaintiff until counsel's letter to Assistant Attorney General Sabatino on November 6, 1991.

The court concludes that that letter constituted an informal refund claim. Its timeliness, under *N.J.S.A.* 54A:9-8(a) is apparent insofar as it pertains to payments made by Antar on December 7, 1989, regarding his 1984 and 1986 taxes. The timeliness of plaintiff's claim as it pertains to all other tax payments made by Antar remains to be determined at the trial. Why plaintiff did not file a protective refund claim as soon as he discovered Antar's allegedly fraudulent payment of New Jersey gross income taxes is not disclosed by the record. *See Dow Chemical Co. v. Dept. of Revenue*, *supra*.

Plaintiff's Entitlement to a Credit for New York Taxes

Plaintiff claims entitlement to a credit against New Jersey gross income taxes paid by Antar for the unpaid New York State tax liability represented by the warrants filed with plaintiff in January and February 1991. The stated basis for plaintiff's claim is *N.J.S.A.* 54A:4-1, which provides:

> (a) A resident taxpayer shall be allowed a credit against the tax otherwise due under this act for the amount of any income tax or wage tax imposed for the taxable year by another state of the United States or political subdivision of such state, or by the District of Columbia, with respect to income which is also subject to tax under this act.
>
> (b) The credit provided under this section shall not exceed the proportion of the tax otherwise due under this act that the amount of the

> taxpayer's income subject to tax by the other jurisdiction bears to his entire New Jersey income.
>
> (c) Readjustment of the tax of another state or political subdivision thereof--if the taxpayer is allowed credit under this section for more or less of the tax of another state or political subdivision thereof than he is finally required to pay, the taxpayer shall send notice of the difference to the director who shall redetermine the tax for any years affected regardless of any otherwise applicable statute of limitations.

If the evidence adduced at trial indicates that, as plaintiff alleges, Antar was not a resident of New Jersey for the years 1984 through 1987, *N.J.S.A.* 54A:4-1 is not applicable, as the statute by its express terms, limits the availability of credit for tax paid to other jurisdictions to New Jersey residents. Moreover, credit may not be allowed unless the tax owed to another jurisdiction is actually paid. Our courts have held that the purpose of the resident credit is to avoid the *actual* multiple taxation of income by New Jersey and another jurisdiction. *Ambrose v. Director, Div. of Taxation*, 198 *N.J. Super.* 546 (App. Div. 1985); *Sorensen v. Director, Div. of Taxation*, 2 *N.J. Tax* 470 (Tax 1981); *Jenkins v. Taxation Div. Director*, 4 *N.J. Tax* 127 (Tax 1982).

Subsection(c) of *N.J.S.A.* 54A:4-1 must be understood in terms of the overall purpose of the resident credit. Since that purpose is to avoid *actual* multiple taxation, it is only when a New Jersey resident actually pays another state an additional amount of tax that the resident credit must be increased. If, as plaintiff asserts, New Jersey were required to refund gross income tax simply because New York made an assessment against Antar, New Jersey would be ceding tax monies even though actual double taxation has not occurred. Under plaintiff's theory, no matter how erroneous the claim of another jurisdiction, New Jersey would have no choice but to increase the resident credit, thereby

generating a refund of gross income tax. As subsection(c) of *N.J.S.A.* 54A:4-1 makes clear, this absurd result has been prevented by requiring a redetermination of a resident's gross income tax liability only when the resident is "finally required to pay" more or less tax to another jurisdiction.

Finally, subsection (a) of *N.J.S.A.* 54A:4-1 clearly indicates that the credit is available only to a New Jersey resident. If Antar were a New Jersey resident, and thus entitled to the benefit of subsection(c) (the readjustment provision), he did not owe the State of New York taxes on the gain from the sale of Crazy Eddie stock, because income from intangible property is taxable only by the state of residence. If Antar were a New Jersey resident, New York's assessment and tax warrant are thus erroneous, and Antar cannot be required to pay an additional amount to New York. If Antar cannot be required to pay an additional amount to New York, the readjustment provision of *N.J.S.A.* 54A:4-1(c) is inapplicable.

If, on the other hand, Antar were a New York resident, he cannot claim the benefit of the resident credit or of the readjustment provision.

Thus, whether Antar be found to be a resident or nonresident of New Jersey, *N.J.S.A.* 54A:4-1 is inapplicable and plaintiff, as a matter of law, is not entitled to relief under that statute.

The Due Process Claim: New Jersey's Taxation of Antar's Income Earned Outside of New Jersey

Plaintiff argues that, since Antar was not a New Jersey resident, under the due process clause of the Fourteenth Amendment to the United States Constitution, New Jersey had no right to tax any portion of Antar's income earned outside New Jersey. Plaintiff cites several cases in support of the fundamental proposition that there be some definite link, some minimal connection between a state and the person it seeks to tax. *See, e.g., Quill Corp. v. North Dakota*, 504 *U.S.* ___ 112 *S.Ct.* ___ 119 *L.Ed.* 2d 91, 102

(1992); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 *U.S.* __ 112 *S.Ct.* __ 119 *L.Ed.* 2d 533, 545 (1992); *Miller Bros. Co. v. Maryland*, 347 *U.S.* 340, 94 *S.Ct.* 535 98 *L.Ed.* 744 (1954). Except for a relatively small amount of salary income earned in New Jersey, plaintiff continues, New Jersey can establish no nexus between Antar and other income entitling New Jersey to exercise its taxing power.

As pointed out above, *N.J.S.A.* 54A:9-8(a) is the exclusive remedy for the recovery of gross income tax paid to New Jersey. The limitations prescribed in that statute apply, even if the tax in question is found to be unconstitutional in its application to a particular taxpayer. *Continental Trailways v. Director, Division of Motor Vehicles, supra.*

Under the common law, where a party, without mistake of fact, fraud, duress or extortion, voluntarily pays money on a demand that is not enforceable against him, he may not recover it. *In re Fees of State Bd. of Dentistry*, 84 *N.J.* 582 (1980). However, as indicated above in the court's discussion of *N.J.S.A.* 54A:9-8(a) as the exclusive remedy for the recovery of gross income taxes paid, the statute preempts the common law rule.

Summary

This opinion, rendered in response to the parties' motions for partial summary judgment, also serves as the predicate for a declaratory judgment on the legal issues addressed, so that the parties can fashion the presentation of evidence with some prior judicial guidance. The opinion serves also to narrow the triable issues, thereby promoting the expeditious resolution of the litigation.

The court's ruling on the exclusivity of *N.J.S.A.* 54A:9-8(a) means that plaintiff's proofs must show compliance with the time lines established thereunder before the court can consider the merits of plaintiff's claim for the recovery of New Jersey gross income tax paid by Antar.

More specifically, the First, Second, Third, Fourth, Fifth and Seventh Counts of the First Amended Complaint will be dismissed. The Sixth Count will also be dismissed as moot, the court having found that plaintiff, through its letter to Assistant Attorney General Sabatino, has filed a written, albeit informal, claim for refund which the court finds to be timely with respect to the payments made by Antar on December 7, 1989, for tax years 1984 and 1986.

The Eighth Count survives, but plaintiff must establish that its informal refund claim, of November 6, 1991, complies with the time constraints imposed by *N.J.S.A.* 54a:9-8(a).

Defendant's counsel will prepare the appropriate order and submit it under *R.* 4:42-1(c).